

## Notice to the Bar:

The Superior Court received and carefully reviewed many comments from the bar on the proposed amendments to Superior Court Rule 9A on Motions and Interlocutory Matters. As a result of those comments, the Superior Court has made various revisions to the proposed amendments. Among those revisions, the new draft clarifies sections of the rule relating to reply and sur-reply memoranda, motions to strike, and procedures for filing a joint appendix; sets forth procedures for including an email address; clarifies the exceptions for transmitting by email the statement of material facts; and proposes the transmitting of documents in rich text format (RTF) unless parties agree to use another word processing format.

With these additional changes in mind, Chief Justice Barbara J. Rouse of the Superior Court invites further comments on **Draft 2** of the proposed changes to Superior Court Rule 9A.

The deadline for comments is **June 27, 2008**. Comments should be mailed to the Superior Court Administrative Office, c/o Maria I. Peña, Suffolk County Courthouse, Three Pemberton Square, 13th Floor, Boston, MA 02108 or emailed to [maria.pena@jud.state.ma.us](mailto:maria.pena@jud.state.ma.us).

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### **DRAFT 2 - May 2008 PROPOSED AMENDMENTS TO SUPERIOR COURT RULE 9A. MOTIONS AND INTERLOCUTORY MATTERS**

**(Applicable to civil cases)**

#### **(a) Submission Form of Motions and Oppositions Thereto.**

(1) *Submission of Motions.* The moving party shall serve with the motion ~~a statement of a separate memorandum stating the~~ reasons, including supporting authorities, why the motion should be granted and may include a request for a hearing. ~~The statement of reasons shall be contained in a separate memorandum.~~ Affidavits and other documents setting forth or **offering evidence of** facts on which the motion is based shall be served with the motion.

(2) *Submission of Oppositions to Motions.* A party opposing a motion may serve **a memorandum in** an opposition. ~~within (A) 10 days after service of a motion other than a motion for summary judgment, (B) 21 days after service of a motion for summary judgment or (C) such additional time as is allowed by statute or order of the court. With the~~ **The memorandum in** opposition, ~~the party may serve in a separate memorandum~~ **may include** a statement of reasons, with supporting authorities, why the motion should not be allowed and may include a request for a hearing. Affidavits and other documents setting forth or **offering evidence of** facts on which the opposition is based shall be served with the **memorandum in** opposition.

(3) *Reply and Sur-reply Memoranda.* ~~Memoranda in reply to memoranda in opposition to a~~

~~motion may not be served without leave of court as permitted in subparagraph (b)(4) hereof.~~ **A reply memorandum may be filed only with leave of court.** Such leave must be sought within five ~~(5)~~ 5 days of service of the ~~a memorandaum to which it applies in opposition.~~ If leave for such a reply is granted, the court shall set the time for its service and the time for any further response thereto. **A reply memorandum shall be limited to addressing matters raised in the opposition that were not and could not reasonably have been addressed in the moving party's initial memorandum. In view of the limitations upon a reply memorandum, a sur-reply is strongly disfavored and may not be filed without leave of court sought within 5 days of service of the reply.**

(4) *Facts Verified by Affidavit.* ~~In civil cases~~ The court need not ~~hear~~ **consider** any motion, or opposition thereto, grounded on facts, unless the facts are verified by affidavit, ~~or are apparent upon the record and files, or are agreed to and stated in writing, signed by the attorneys for the parties~~ interested **parties or their counsel.**

~~(5) Additional Papers.~~ Papers not served with the motion or opposition may be filed only with leave of court.

**(5) Format and Length.** All motions, memoranda of law and other papers, except for exhibits, filed pursuant to this rule shall be filed on 8 1/2" by 11" paper and, except for exhibits, shall be typed in no less than 12-point type and double-spaced, provided that the title of the case, footnotes and quotations may be single spaced. The title of each document shall appear on the first page thereof. Unless leave of court has been obtained in advance, all memoranda of law and the oppositions thereto shall not exceed 20 pages, and any reply memoranda shall not exceed 10 pages. Any appendix permitted by Superior Court Rule 30A shall not be included in the page limit. To request leave of court, a party shall send a letter to the Justice presiding in the session where the motion will be filed stating the number of pages the party desires, and why the party's objective cannot be achieved within the applicable page limit. The letter shall be served on all other parties. Any leave of court obtained by a moving party shall apply to all opposing parties. The moving party shall serve notice thereof with the moving party's memorandum.

**(6) Email Addresses.** Each party or attorney filing motion or opposition papers shall include his or her email address on the papers, unless he or she does not have an email address.

**(b) Procedure for Serving and Filing Motions.**

(1) *General.* All motions and oppositions shall be served on all parties and filed ~~in court with the clerk~~ in accordance with the procedure set forth in this Paragraph (b). Compliance with this Paragraph is compliance with the "reasonable time" provisions of the first sentence of Mass. R. Civ. P. 5(d)(1).

(2) *Service and Filing of Motions and Oppositions.* The moving party shall serve a copy of the motion and the other documents specified in Paragraph (a)(1) of ~~by~~ this rule on every other party. Every opposing party shall serve on the moving party an original and a copy, and on every other party a copy, of the opposition and the other documents specified in Paragraph (a)(2) of ~~by~~ this rule. Service shall be made within the time permitted by Paragraph (a)(2) of this rule and Mass. R. Civ. P. 6(d). Upon receipt of the opposition and associated documents, if any, the moving party shall physically attach the original of the opposition and associated documents to the original motion and associated documents and within ten days shall file with the clerk the combined documents unless within the same ten-day period the moving party notifies all counsel that the motion has been withdrawn. **The opposition to a motion shall be served within (A) 10 days after service of a motion other than a motion for summary judgment, (B) 21 days after service of a motion for summary judgment or (C) such additional time as is allowed by statute or order of the court. Upon receipt of the opposition and associated documents, if any, the moving party shall attach the original of the opposition and associated documents to the original motion and associated documents and within 10 days shall file with the clerk the combined documents (“the Rule 9A package”), unless within the same 10-day period the moving party notifies all counsel that the motion has been withdrawn. If leave to file a reply memorandum is allowed, the reply shall be served and filed within 10 days of the allowance, unless the court orders otherwise. If leave to file a reply has been allowed, or, if a motion to strike has been served in response to the opposition to a motion or a cross-motion, the period for filing the Rule 9A package is extended to the time granted for serving the reply or the opposition to the motion to strike. A separate document accompanying the filing shall list the title of each paper in the combined documents document in the Rule 9A package. If the moving party does not receive an opposition within three 3 business days after expiration of the time permitted for service of an oppositions, then the moving party shall file with the clerk the motion and other documents initially served on the other parties with an affidavit reciting compliance with this rule and receipt of no opposition in timely fashion, unless the moving party has notified all parties or a statement that the motion is has been withdrawn and will not be filed. The moving party shall give prompt notice of the filing of the motion Rule 9A package to all other parties by serving thereon a copy of a certificate of service notice of filing on a separate document.**

(3) *Cross-Motions.* ~~A cross-motions, (including, motions to strike), accompanied by the other documents specified in Paragraph (a)(1) of this rule, shall be served on the moving party with the opposition to the original motion. Upon receipt of the cross-motion and opposition, the moving party~~ **A party opposing a cross-motion (A) may serve an a memorandum in opposition in accordance with Paragraph (b)(2) of this rule within (A) 10 days after service of a cross-motion other than a cross-motion for summary judgment, (B) 21 days after service of a cross-motion for summary judgment or (C) such additional time as is allowed by statute or order of the court. and (B) shall file the cross-motion and any opposition with the papers and in the manner specified in Paragraph (b)(2) of this rule. After receipt of an opposition or cross-motion, and supporting papers, the moving party may serve on the opposing party any appropriate motion to strike. If the moving party serves such a motion, he or she shall not file the papers described in Paragraph (b)(2) of this rule until the time for filing an opposition to the**

~~motion to strike has expired. The moving party shall file the motion to strike and any opposition thereto with the papers and in the manner specified in Paragraph (b)(2) of this rule.~~

**(4) *Motions to Strike.* (i) A motion to strike brought in response to a motion shall be served along with the opposition to the original motion. An opposition to the motion to strike shall be served within 10 days of service of the motion to strike. The motion to strike and the opposition thereto shall be filed with the Rule 9A package relating to the original motion in the manner specified in Paragraph (b)(2) of this rule.**

**(ii) A motion to strike brought in response to the opposition to a motion shall be served within 10 days of service of the opposition. An opposition to the motion to strike shall be served within 10 days of service of the motion to strike. The motion to strike and the opposition thereto shall be filed with the Rule 9A package relating to the original motion in the manner specified in Paragraph (b)(2) of this rule. Compliance with the times for service contained herein shall extend the time for filing prescribed in Paragraph (b)(2) of this rule.**

**(iii) A motion to strike brought in response to a cross-motion shall be served along with the opposition to the cross-motion. An opposition to the motion to strike shall be served within 10 days of service of the motion to strike. The motion to strike and the opposition thereto shall be filed with the Rule 9A package relating to the original motion and the cross-motion in the manner specified in Paragraph (b)(2) of this rule. Compliance with the times for service contained herein shall extend the time for filing prescribed in Paragraph (b)(2) of this rule.**

~~(4) *Form of Motions and Memoranda.* All motions, memoranda of law and other papers filed pursuant to this rule shall be filed on 8 1/2" by 11" paper. Unless leave of court to file a memorandum of greater length has been obtained in advance, the initial memorandum of law and the initial response thereto shall not exceed the equivalent of twenty (20) typed, double-spaced pages, provided that (A) the title of the case, footnotes and quotations may be single spaced; and (B) any appendix permitted by Superior Court Rule 30A shall not be included in the twenty-page limit and any reply memoranda shall not exceed the equivalent of ten (10) typed, double-spaced pages. To obtain leave of court, counsel may send a letter to the Justice presiding in the session where the motion will be filed stating the number of pages counsel desires and why counsel's objective cannot be achieved in twenty pages. The letter shall be served on counsel for all other parties. Any leave of court obtained by the moving party shall apply to all parties and the moving party shall serve notice thereof with the moving party's brief.~~

**(5) *Summary Judgment Motions.* (i) Each A motion for summary judgment shall be accompanied by a concise statement ~~in consecutive numbered paragraphs,~~ of the material facts as to which the moving party contends there is no genuine issue to be tried, **set forth in consecutively numbered paragraphs**, with page or paragraph references to supporting pleadings, depositions, answers to interrogatories, **responses to requests for admissions and affidavits.** ~~and a statement of the legal elements, with citations to supporting law, of each claim upon which~~**

~~summary judgment is sought.~~ Failure to include the foregoing statement~~s~~ shall constitute grounds for denial of the motion. **In addition to the service specified in Paragraph (b)(2) of this rule, the statement of material facts shall be contemporaneously sent in electronic form by email to all parties against whom summary judgment is sought in order to facilitate the requirements of the following paragraph. The statement of material facts in electronic form shall be sent as an attachment to an email and shall be in Rich Text Format (RTF) unless the parties agree to use another word processing format. The requirement to email the statement of material facts to the opposing party does not alter the date or method of service, which continues to be governed by Mass. R. Civ. P. 5(b). The requirement for transmission by email of the statement of material facts in electronic form shall be excused if (A) the moving or any opposing party is appearing *pro se*, (B) the attorney for the moving party certifies in an affidavit that he or she does not have access to email, or (C) the attorney for the moving party certifies in an affidavit that an opposing party's attorney has no email address or has not disclosed his or her email address.**

(ii) ~~Each~~ **An** opposition to a motion for summary judgment shall include a response to the moving party's statement of facts as to which the moving party claims there is no genuine issue to be tried. To permit the court to have in hand a single document containing the parties' positions as to material facts in easily comprehensible form, in preparing this response the opposing party shall reprint the moving party's statement of material facts and shall set forth a response to each directly below the appropriate numbered paragraph. Where the obligation to send the statement of material facts in electronic form has been excused, the response to the statement of material facts may be in a separate document. **Where a response disputes a particular statement of material fact, the opposing party shall support the response** ~~, using the same paragraph numbers, to the moving party's statement of facts as to which the moving party claims there is no genuine issue to be tried, in consecutive numbered paragraphs, a concise statement of any additional material facts as to which the opposing party contends there is a genuine issue to be tried,~~ with page or paragraph references to supporting pleadings, depositions, answers to interrogatories, **responses to requests for admission~~s~~ and affidavits.** ~~, and in the event the opposing party disagrees with the moving party's statement of the elements of the claims as to which summary judgment is sought, a statement of the legal elements, with citations to supporting law, of each claim upon which summary judgment is opposed.~~ **For purposes of summary judgment, the moving party's statement of a material fact shall be deemed to have been admitted unless controverted as set forth in the preceding sentence.**

(iii) Neither the ~~concise~~ statement of material facts as to which there is no genuine issue to be tried nor the response thereto shall be subject to the ~~twenty~~ **20**-page limitation in ~~subparagraph (4)~~ **Paragraph (a) (5) of this rule above.**

For purposes of the motion for summary judgment, facts contained in a statement described in the first paragraph hereof shall be deemed to have been admitted unless controverted in the manner set forth in the second paragraph hereof.

**(iv) An opposing party, with the response to the moving party's statement of facts, may assert an additional statement of material facts as to which there is a genuine issue to be tried with respect to the claims on which the moving party seeks summary judgment, each to be supported as above. Such an additional statement shall be a continuation of the opposing party's response described in Paragraph (b)(5)(ii), with an appropriate heading, and shall not be a separate document. In addition to the service specified in Paragraph (b)(2) of this rule, where the party opposing summary judgment includes such an additional statement in its response, the response, including the additional statement, also shall be sent in electronic form by email to the moving party, unless excused as provided in Paragraph (b)(5)(i). The moving party shall respond to the opposing party's additional statement of material facts within the time prescribed by Paragraph (b)(2)(B), resulting in a single document for the court's consideration, unless the obligation to send the additional statement of material facts in electronic form has been excused. For purposes of summary judgment, the opposing party's additional statement of a material fact shall be deemed to have been admitted unless controverted as set forth in the preceding sentence.**

**(v) Cross-motions for summary judgment and oppositions thereto shall comply with the requirements of Paragraph (b)(5), with the result that there shall be a single consolidated document containing the respective statements of material facts and responses thereto.**

**(vi) All exhibits referred to in a motion, a cross-motion, or opposition thereto shall be filed as a joint appendix, which shall include an index of the exhibits. The initial moving party, with the cooperation of each opposing party, shall be responsible for assembling the joint appendix and the index. Unless all the pages of the joint appendix are consecutively numbered, each exhibit shall be separated by an off-set tab divider. Where such dividers are used, the exhibits in the joint appendix shall be numbered consecutively. The moving party shall serve a copy of its exhibits to each opposing party with the motion. If a party opposing the initial motion designates additional exhibits, the additional exhibits shall begin with the next consecutive designation following the last designation by the initial moving party. Where an opposing party relies upon any evidence contained in the exhibits supporting the motion for summary judgment, the opposing party in its memorandum shall cite to that evidence using the form of designation of the moving party. Where the opposing party relies upon evidence not contained in such exhibits, the opposing party shall treat such additional evidence as new exhibits. Such new exhibits, as well as an index of the new exhibits, shall be served with the opposition. The initial moving party shall certify that the joint appendix includes all exhibits served upon the initial moving party with the opposition to the summary judgment motion. If the initial moving party does not receive with the opposition an exhibit designated by the opposing party, then the moving party shall file with the clerk the joint appendix of exhibits without that designated exhibit, with the certification required by this rule. The burden will then rest with the opposing party to seek leave from the court to file any designated exhibit not timely submitted.**

(vii) The initial moving party, upon filing a motion for summary judgment, shall serve upon the opposing parties, in paper and electronic form, unless electronic form is excused, the consolidated statement of material facts and responses filed with the clerk, unless the response is filed as a separate document in accordance with this rule. The moving party shall also serve upon the opposing parties the joint appendix of exhibits, including the index of the exhibits, filed with the clerk, unless the parties otherwise agree. If the joint appendix of exhibits, including the index, is in electronic form, an electronic copy shall also be sent, unless the parties otherwise agree.

~~The statements filed by the moving party and opponent shall be accompanied by copies of all cited portions of documents referred to in those statements.~~

~~It shall be the responsibility of the parties to cooperate and file with the motion papers a single combined set of those exhibits, documents, transcripts and other things relied upon by all parties, in order thereby to avoid the filing of duplicate or multiple copies of the same things. In this process, the parties ought not over-designate materials and thereby burden the court. Further, however, within the spirit of the foregoing, no request for the inclusion of materials shall be denied by the party assembling the record.~~

(6) *Sanctions for Noncompliance.* The court need not ~~act on~~ **consider** any motion **or opposition** unless the parties have complied **that fails to comply** with the requirements of this **procedure rule**.

### **(c) Hearings on Motions.**

(1) *Marking.* No party shall mark any motion for hearing. In the event that the court believes that a hearing is necessary or helpful to a disposition of the motion, the court will set the time and date for the hearing and will notify the parties of that date and time.

(2) *Request for Hearing.* A request for a hearing shall set forth any statute or rule of court which, in the judgment of the submitting party, requires a hearing on the motion. After reviewing the motion, the court will decide whether a hearing should be held and, if a hearing is to be held, will notify the parties in accordance with Paragraph (c)(1) hereof. Failure to request a hearing shall be deemed a waiver of any right to a hearing afforded by statute or court rule.

(3) *Presumptive Right to a Hearing.* Requests for hearings on the following motions will ordinarily be allowed: Attachments (Rule 4.1), Trustee Process (Rule 4.2), Dismiss (Rule 12), Adopt Master's Report (Rule 53), Summary Judgment (Rule 56), Injunctions (Rule 65), Receivers (Rule 66), Lis Pendens (G.L. c. 184, sec. 15). Denial of a request for hearing on such motions will be accompanied by a written statement of reasons for the denial.

**(d) Disposition of Motions.**

Motions which are not set down for hearing in accordance with Paragraph (c) hereof will be decided on the papers filed in accordance with this rule.

**(e) Exceptions.** The provisions of this rule shall not apply to the following motions:

(1) *Ex Parte, Emergency, and Other Motions.* ~~Hearings on, or disposition of,~~ **A party filing an ex parte, emergency, and or motion for appointment of special process server motions shall be scheduled on an individual basis through the appropriate clerk of court is excused from compliance with Paragraphs (b)(1) and (b)(2) of this rule. Ex parte motions shall be served within 3 days of a ruling on the motion. Emergency motions shall be served on all parties forthwith upon filing.**

(2) *Motions Excepted by Administrative Order Involving Incarcerated Parties.* ~~Motions excepted from the operation of this rule by Administrative Order of the Superior Court shall be governed in all respects by the terms of that Administrative Order.~~ **Administrative Directive No. 92-1, which governs civil actions filed by a party who is incarcerated, waives that part of subdivision (b)(2) of this rule that requires the filing of the Rule 9A package. Such waiver also shall apply to motions in civil actions where a defendant is incarcerated and appearing *pro se*, but only where the incarcerated defendant is the moving party.**